

**RESPONSE TO COMMENTS ON
THE LAC DU FLAMBEAU BAND OF LAKE SUPERIOR CHIPPEWA INDIANS
APPLICATION FOR TREATMENT IN THE SAME MANNER AS A STATE
FOR SECTIONS 303(c) AND 401 OF THE CLEAN WATER ACT**

By letter dated October 12, 2005 the Lac du Flambeau Band of Lake Superior Chippewa Indians (Tribe or Band) submitted an application (Application) for treatment as state (TAS) for purposes of Sections 303 and 401 of the Clean Water Act (CWA). EPA's action today is based on the Application, together with additional supporting documents, which can be found in the Administrative Record. Pursuant to 40 C.F.R. 131.8(c)(2), EPA is required to notify "appropriate governmental entities"¹ of, and provide them an opportunity to comment on, "the substance and basis of the Tribe's assertion of authority to regulate the quality of reservation waters." Accordingly, on December 1, 2005, EPA provided a copy of the Tribe's Application to the State of Wisconsin (State) with an opportunity to review the Tribe's assertion of authority to identify any competing jurisdictional claims. Thereafter, consistent with EPA's practice, EPA prepared a Proposed Finding of Fact (PFOF) document, which sets forth the facts upon which the Agency may rely in analyzing the Tribe's assertion of inherent Tribal authority over nonmember activities with the Reservation. On June 15, 2007, EPA provided the State an opportunity to review and comment on EPA's PFOF.

Consistent with Agency practice, EPA also provided an opportunity for local governments and the public to review and comment on the Application and PFOF. Notice of the Application was provided to the public through newspaper publication and at a public meeting held on February 15, 2006 at the Lac du Flambeau High School in Lac du Flambeau, Wisconsin. The notice requested that all comments be submitted to the State.

Comments were submitted to EPA by the State as follows:

1. By letter dated February 21, 2006, Scott Hassett, Secretary of the Wisconsin Department of Natural Resources, submitted comments on the Tribe's Application.
2. By letter dated August 3, 2007, Scott Hassett, Secretary of the Wisconsin Department of Natural Resources, submitted comments on EPA's proposed findings of fact regarding the Tribe's authority over nonmember activities on fee lands to administer the water quality standards program.

In addition, the State transmitted comments from the general public. EPA's practice is to address all comments received, including those on the Tribe's assertion of authority that are sent directly to EPA from commenters other than appropriate governmental entities.

¹ EPA defines "appropriate governmental entities" as "States, Tribes, and other Federal entities located contiguous to the reservation of the Tribe which is applying for treatment as a State." 56 Fed. Reg. 64876, 64884 (December 12, 1991). The term does not include local governments such as cities and counties. *Id.*

In this Response to Comments document, EPA addresses all comments provided to the Agency regarding the Tribe's TAS Application and EPA's PFOF.

The document is organized into two sections. The first section responds to the comments received from the State of Wisconsin. The second section responds to comments submitted by members of the public. Where a comment was raised by both the State and one or more public commenters, a response appears only in the State comment section. Additionally, we have consolidated comments where similar issues were raised.

Comments submitted on Tribe's Application by the State of Wisconsin in its letter of February 21, 2006

State Comment 1: Tribal TAS would create a duplicative patchwork of regulation within the State of Wisconsin and have a potential impact on the State's continued issuance of permits for discharges upstream of the Lac du Flambeau Reservation, including the Lakeland Sanitary District and the Woodruff fish hatchery.

Response: Currently, there are no federally-approved water quality standards (WQS) for the Lac du Flambeau Reservation. The State's CWA WQS do not apply to waters in Indian country within the State of Wisconsin, including the Lac du Flambeau Reservation. If approved by EPA, the Tribe's standards would be the applicable WQS for the Reservation for purposes of the CWA. Pursuant to CWA Section 402(a) and (b) and 40 C.F.R. 122.4(d), EPA regulations prohibit the issuance of a permit that does not include limits stringent enough to ensure compliance with water quality requirements of all affected states. See *Arkansas v. Oklahoma*, 403 U.S. 91 (1992). Accordingly, Wisconsin's issuance of permits to dischargers upstream from the Lac du Flambeau Reservation would be conditioned on containing sufficiently stringent limits to ensure compliance with the Tribe's water quality standards at the border of the Reservation, if and when those standards are federally approved. Additionally, pursuant to CWA Section 518(e), EPA has promulgated procedures for resolving any disputes which may occur between states and tribes arising as a result of differing WQS on common bodies of water. 40 C.F.R. 131.7. Hence, EPA does not anticipate any difficulties in implementation of the State's and Tribe's respective WQS programs under the CWA.

State Comment 2: The State of Wisconsin expressed concern that the Tribe would use a grant of eligibility for CWA Section 303 and 401 as authority to regulate activities not clearly subject to the Clean Water Act. Wisconsin cites concerns about the Tribe's regulation of shoreline development and the regulation of motorized boating as examples. Other commenters expressed similar concerns and have stated that the Tribe's Application should be rejected because the Tribe seeks authority for activities beyond what is regulated by the Clean Water Act.

Response: The Tribe's Application only seeks TAS eligibility to establish WQS for purposes of Sections 303 and 401 of the Clean Water Act. (Letter from William Perry to Jo Lynn Traub, dated May 31, 2006). The commenters' concerns may have stemmed from a draft ordinance attached to the Application as Attachment N.8. The Tribe's

clarification letter of May 31, 2006, makes clear that the attachment was submitted as an example of the Tribe's capability and experience in carrying out environmental programs and that the Tribe is seeking EPA approval only to administer programs under Sections 303 and 401 of the CWA.

EPA's action today is solely to find that the Tribe is eligible under Section 518(e) of the CWA to carry out the Section 303 and 401 programs. EPA is not today approving the Band's WQS under Section 303. A tribe with TAS for WQS must still develop WQS, submit them to EPA, and obtain federal approval of the WQS it submits to EPA before the standards can become effective under the CWA.

State Comment 3: Pursuant to the Supreme Court's decision in *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989) (hereafter, *Brendale*), the LDF reservation is "open" and therefore the Tribe cannot assert any jurisdictional authority over waters in the "open area."

Response: In its 1991 rulemaking, "Amendments to the Water Quality Standards Regulation that Pertain to Standards on Indian Reservations; Final Rule," EPA concluded that the prevailing test for determining tribal inherent authority over non-member activity on nonmember-owned fee lands within a reservation was established in *Montana v. United States*, 450 U.S. 544 (1981) (hereafter "*Montana*"). In doing so, EPA addressed the *Brendale* decision and its effect on EPA's analysis of tribal authority under CWA Section 518. In the preamble to the rule, EPA stated:

EPA does not read the holding in *Brendale* as preventing EPA from recognizing Tribes as States for purposes of regulating water quality on fee lands within the reservation, even if section 518 is not an express delegation of authority. . . . In *Brendale*, both the State of Washington and the Yakima Nation asserted authority to zone non-Indian real estate developments on two parcels within the Yakima reservation, one in an area that was primarily Tribal, the other in an area where much of the land was owned in fee by nonmembers. Although the Court analyzed the issues and the appropriate interpretation of *Montana* at considerable length, the nine members split 4:2:3 in reaching the decision that the Tribe should have exclusive zoning authority over property in the Tribal area and the State should have exclusive zoning authority over non-Indian owned property in the fee area. . . .

Given the lack of a majority rationale, the primary significance of *Brendale* is in its result, which was fully consistent with *Montana v. United States*, which previously had held that:

To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate...the activities of non-members who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.... A tribe may also retain inherent power to exercise civil authority over the

conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Montana, 450 U.S. at 565-66 (citations omitted).

In *Brendale*, the Court applied this test, finding Tribal authority over activities that would threaten the health and welfare of the Tribe. 492 U.S. at 443-444 (Stevens, J., writing for the Court); *id.* at 449-450 (Blackmun, J. concurring). Conversely, the court found no Tribal jurisdiction where the proposed activities “would not threaten the Tribe’s...health or welfare.” *Id.* at 432 (White, J., writing for the Court). The Agency therefore disagrees with commenters who argue that *Brendale* somehow overrules *Montana*.

56 Fed. Reg. 64876, 64877 (December 12, 1991).

As EPA noted in the rulemaking, there is no majority opinion in *Brendale* and the significance of the case is therefore limited.

EPA further stated that, to determine whether a Tribe has demonstrated the requisite authority over the conduct of non-members within an Indian reservation, EPA “will examine the Tribe’s authority in light of the evolving case law . . .” *Id.* at 64878. As discussed in the Decision Document at page 10, the Supreme Court has confirmed that the *Montana* test remains the relevant standard for determining tribal civil authority over nonmember activities.

State Comment 4: Citing several cases, including Wisconsin v. Baker, 698 F.2d 1323 ((7th Cir. 1983), the State argues that the Tribe’s claim of inherent authority over its waters must fail because, upon Wisconsin’s admission into the Union, it acquired equal, sovereign authority over navigable waters of the State as that held by the original 13 states (often referred to as the Equal Footing Doctrine) and that the waters within the State are held within the “absolute authority” of the State for the common “use and enjoyment” of its public (sometimes referred to as the public trust doctrine). Accordingly, the State claims that “the navigable waters passed to the State of Wisconsin upon its admission to the Union. . . unencumbered by any aboriginal Chippewa sovereignty” and that the State “possesses inherent authority to regulate navigation and to protect many public rights in navigable waters. . . .” (Letter from Scott Hassett to Jo-Lynn Traub, February 21, 2006, at 5 - 7).

Response: Pursuant to the Clean Water Act’s Section 518, a tribe may demonstrate jurisdiction over water resources where:

[T]he functions to be exercised by the Indian tribe pertain to the management and protection of water resources which are held by an Indian tribe, held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust

restriction on alienation, or otherwise within the borders of an Indian reservation. . . .

33 U.S.C. § 1377(e)(2), CWA Section § 518(e)(2). In the preamble to its 1991 rule, the Agency explained that “EPA also does not believe that section 518(e)(2) prevents EPA from recognizing Tribal authority over non-Indian water resources located within the reservation if the Tribe can demonstrate the requisite authority over such water resources.” *Id.* at 64881-82. The argument that the waters of the State are held in public trust, and the related argument that title to the beds, submerged lands, and/or navigable waters inheres in the state of Wisconsin, do not preclude a showing of tribal regulatory authority for purposes of Section 518 of the CWA, where the waters are “within” the boundaries of a federally-recognized Indian tribe’s reservation and the tribe, as here, has demonstrated regulatory jurisdiction over those waters.

This position was expressly affirmed by the Seventh Circuit Court of Appeals in its decision in *Wisconsin v. EPA*, 266 F.3d 741 (7th Cir. 2001), *cert. denied*, 535 U.S. 1121 (2002), in which the court upheld EPA’s decision to grant TAS eligibility for CWA Sections 303 and 401 to the Sokaogon Chippewa (Mole Lake) Band over objections made by the State on Equal Footing grounds. There, the Seventh Circuit found that “[i]t was reasonable for the EPA to determine that ownership of the waterbeds did not preclude federally approved regulation of the quality of the water, and we uphold that determination.” *Id.* at 747. This authority stems from Congress’s plenary power over navigable waters under the Commerce Clause, which, the Seventh Circuit found, “has not been eroded in any way by the Equal Footing Doctrine cases.” *Id.* at 747.

Comments submitted on EPA’s Proposed Findings of Fact by the State of Wisconsin in its letter of August 7, 2007

State Comment 5: In its comments on the EPA’s Proposed Findings of Fact, the State applauded the Tribe’s clarification that it seeks only to develop WQS in a manner consistent with the Clean Water Act. The State writes that this clarification assures the State that the Tribe does not intend this Application to address matters outside the scope of the Act.

Response: EPA agrees that its approval of the Tribe’s Application will authorize the Tribe to promulgate WQS in a manner consistent with the Clean Water Act.

State Comment 6: The State also indicated that it has no significant dispute with the proposed findings of fact set forth in EPA’s Proposed Finding of Fact. It does, however, refer to the comments made in its February 21, 2006 letter and expresses concern that EPA has not made specific findings on the extent of non-Indian settlement and ownership of land within the Reservation.

Response: We are pleased the State had no significant dispute with our Proposed Findings of Fact. We read the State’s concern that we did not include findings regarding non-Indian settlement and ownership as related to its argument that under *Brendale*, the

Tribe has no authority over “open” areas of the Reservation. For the reasons stated in our response to State Comment 3, the test for analyzing the Tribe’s authority is set forth by the Supreme Court in its *Montana* decision. Hence, it is not necessary to make specific findings as to “open” or “closed” areas of the Reservation.

Comments submitted by the Public Not Previously Addressed Regarding Both the Application and EPA’s Proposed Findings of Fact

Public Comment 1: One commenter states that CWA Section 518 is not a delegation of authority to Indian tribes and that the language of Section 518 and its legislative history require that a tribe demonstrate inherent authority to regulate reservation waters.

Response: EPA has not interpreted Section 518 as a congressional delegation of authority to tribes. See 56 Fed. Reg. 64876, 64880. Accordingly, the Tribe’s Application has been reviewed as requiring a demonstration of the Tribe’s jurisdiction over reservation waters for CWA purposes.

Public Comment 2: One commenter asserts that under Section 518, TAS status can only be granted for waters within reservation boundaries.

Response: EPA agrees. Under CWA Section 518(e), “Tribes are limited to obtaining treatment as a State status for water resources within the borders of a reservation.” 56 Fed. Reg. at 64881. This position derives from the language of CWA Section 518(e)(2), which states in part:

“the functions to be exercised by the Indian tribe pertain to the management and protection of water resources which are held by and Indian tribe, held by the United States in trust for Indian, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation or otherwise within the borders of an Indian reservation.”

Public Comment 3: One commenter states that a tribe must demonstrate that those waters are “held” in some fashion by or on behalf of the Tribe.

Response: For purposes of demonstrating authority under CWA Section 518(e) to carry out the water quality program, it is not necessary that a tribe show that water resources within the reservation are “held” by or on behalf of the tribe or a tribal member. This is because there are four separate categories of waters for which a tribe can seek TAS under Section 518(e)(2): (1) water resources held by an Indian tribe within the borders of a reservation; (2) water resources held by the United States in trust for Indians within the borders of a reservation; (3) water resources held by a member of an Indian tribe (if such property interest is subject to a trust restriction on alienation) within the borders of a reservation; *and* (4) water resources otherwise within the borders of a reservation. EPA has consistently read the phrase “*or otherwise within the borders of an Indian reservation*” as a separate category of water resources as well as a modifier of the preceding three categories. 56 Fed. Reg. at 64881. Accordingly, there is no requirement

that waters within the Reservation be held by or on behalf of a tribe if they are “otherwise within the borders of an Indian reservation” so long as a tribe is able to demonstrate the requisite authority over such water resources.

Public Comment 4: One commenter argues that the treaties which establish the Lac du Flambeau Reservation did not reserve or convey water resources to the Tribe and that these treaties conveyed only “dry land.” The commenter argues that the Tribe cannot assert authority over waters within its reservation where no waters are within the reservation as required by Section 518.

Response: The waters within the boundaries of the Lac du Flambeau Reservation are “otherwise within the reservation” for purposes of CWA Section 518(e). None of the judicial cases cited by the commenter suggests in any way that the waters in question are not within the Reservation. The cases cited by the commenter address the issue of title to the beds and banks of waters within the Reservation and the affect that this may have on the Tribe’s assertion of authority over these waters. That issue is discussed more fully in response to State Comment 4.

One commenter argues that the map included as a part of the Tribe’s Application does not show the waters within the borders of the Reservation and, thus, that there are no waters within the Reservation. We find, however, that the Tribe’s Application adequately describes the waters within the borders of the Reservation. The maps attached to the Application show lakes, rivers, streams and other water bodies. Additionally, the Application establishes the importance of water and water-related resources to the Tribe.

Public Comment 5: A commenter argues that even if there are waters within the Reservation, they are not held by a tribe as required by CWA Section 518 because the State of Wisconsin has retained title to the beds, banks and waters within the reservation. Therefore, the waters are not held by an Indian tribe as required by CWA Section 518.

Response: Please refer to our response to State Comment 4.

Public Comment 6: One commenter asserts that the 7th Circuit’s decision in *Wisconsin v. EPA*, 266 F.3d 741 (7th Cir. 2001) is not “controll[ing]” to the Lac du Flambeau Tribe’s request for Treatment as a State for Sections 303 and 401 of the CWA because that case involved a different tribe and different facts.

Response: EPA reviewed the Tribe’s Application for TAS eligibility based on the specific facts of the Application. Consistent with the Seventh Circuit’s decision in *Wisconsin v. EPA*, we have determined that the Tribe has made the necessary showing of its authority and is entitled to TAS status.

Public Comment 8: The Commenter states that the Supreme Court has limited the application of the *Montana* test in *Brendale*. According the commenter, tribes lack authority to regulate non-members in “open areas” of the Reservation under the *Brendale* test.

Response: Please see the response to State Comment 3.

Public Comment 9: One commenter argues that the Tribe has not established that it has inherent authority to regulate non-members under the standards set forth by the U.S. Supreme Court in *Montana*. The commenter cites numerous cases for the proposition that under *Montana* the Tribe must show that the activity of non-members threatens the ability of *tribal government* to function, not whether the activity has some adverse impact on tribal members. The commenter states that “[s]erious impacts to tribal member health and safety including serious injury and death do not trigger the [*Montana* second] exemption.” The commenter states that the approach under EPA’s WQS rule is obsolete because it suggests otherwise. The commenter then asserts that since the Tribe has functioned effectively as a government without TAS status to date, that therefore it has not shown that activities of non-members are a threat to the Tribal government.

Response: The Decision Document at pages 9 - 13 fully discusses EPA’s approach to analyzing assertions of tribal inherent authority over nonmember activities under the *Montana* test for purposes of regulating water quality on reservations under the CWA. It explains that the *Montana* test remains the relevant standard and that, to meet EPA’s formulation of the *Montana* “impacts” test, a tribe needs to show that the actual or potential impacts of nonmember activities on the tribe are “serious and substantial.” Moreover, the *Montana*-test discussion notes EPA’s long-standing view that “water quality management serves the purpose of protecting public [, including tribal member] health and safety, which is a core governmental function critical to self-government.” Decision Document at p. 10, citing 56 Fed. Reg. at 64879. EPA’s approach to tribal inherent authority under CWA Section 518(e) for purposes of the WQS program has been upheld by the courts. *E.g.*, *Montana v. U.S. Environmental Protection Agency*, 137 F.3d 1135 (9th Cir.), *cert. denied*, 525 U.S. 921 (1998); *Wisconsin v. EPA*, 266 F.3d 741 (7th Cir. 2001), *cert. denied*, 535 U.S. 1121 (2002).

The Decision Document, including the Findings of Fact, explains the basis for EPA’s conclusion that the Tribe has demonstrated its inherent authority over nonmember activities under the *Montana* “impacts” test for purposes of establishing WQS under the CWA.

Public Comment 10: A commenter asserts that the Tribe is not imperiled by its ability to regulate water resources, that Tribal concerns will not be remedied by granting TAS, and that the Tribal government does not need to regulate water quality in light of existing state and federal laws.

Response: Under CWA Section 518(e), tribes may seek TAS status to regulate water quality for reservation waters within their jurisdiction. EPA has granted TAS eligibility to the Lac du Flambeau Tribe for purposes of setting WQS under the CWA for its Reservation. At present, there are no federally-approved WQS for the Lac du Flambeau Reservation. The State of Wisconsin has not been federally authorized to implement its

WQS for the Lac du Flambeau Reservation. Accordingly, the grant of TAS status to the Tribe to set WQS is appropriate under the Clean Water Act.

Public Comment 11: A commenter asserts that the political and economic vitality of the Lac du Flambeau tribal government is dependent on its gaming operations, not subsistence fishing activities. Since the tribal government is able to provide basic services and function as a government without TAS, tribal government is not imperiled. The fact there may be impacts by non-member activities within the Reservation is not enough to satisfy the second *Montana* exception.

Response: See the response to Public Comment 9 and 10, above.

Public Comment 12: Tribal TAS would create an unfair burden on Wisconsin businesses, result in adverse economic impacts to the area, and have a negative impact on property values. EPA should consider these impacts in making its determination whether to approve the Tribe's Application for TAS.

Response: The TAS eligibility criteria in Section 518(e) of the CWA and EPA's implementing regulations do not provide for EPA to consider the economic implications of a TAS application on third parties. However, when EPA makes a decision on tribal regulatory program authority (as opposed to a TAS decision), EPA can take economic factors into account to the same extent they are considered for decisions on state programs. For tribes that have received approval for TAS for WQS, economic and social implications may be considered at the time standards are adopted and implemented in accordance with applicable regulations. For example, EPA's regulations provide that in revising its WQS, a state or authorized tribe may remove a designated use under certain circumstances by demonstrating that attaining the use is not feasible because controls to meet the use "would result in substantial and widespread economic and social impact." 40 C.F.R. 131.10(g)(6). In such cases, the state or authorized tribe, and EPA, could consider economic impacts generally. EPA has issued guidance for implementing this provision of the regulations: Interim Economic Guidance for Water Quality Standards, March 1995, available at <http://www.epa.gov/waterscience/standards/econworkbook/>, which provides further information.

The Tribe's TAS status and subsequent EPA approval of its WQS are not expected to adversely affect property values or tax revenues from property taxes assessed by local governments. Instead, Tribal standards that protect water quality within the Lac du Flambeau Reservation will serve to preserve and protect surrounding property values and the tax base. The Tribe has substantial investments in the region's business community. Those investments have helped make the region a more attractive place to live and recreate, which benefits regional property values and the local and state tax bases. There is no basis to expect that the Tribe would use its TAS authority to undermine its substantial investments in the economy and the natural resources that sustain it.

Public Comment 13: One commenter asserts that granting the Tribe TAS eligibility to set WQS for the Reservation's waters would constitute a taking of property under the 5th

Amendment, because the State of Wisconsin holds title to the waters and their underlying beds under the Equal Footing Doctrine.

Response: EPA's decision to approve the Tribe's TAS Application does not implicate the Fifth Amendment's Takings Clause, which relates to governmental actions that effectuate compensable takings of private property for public use. See also EPA's response to the State Comment 4 regarding the Equal Footing Doctrine.

Public Comment 14: One commenter asserts that authorizing the Tribe to regulate water quality under Section 303 and 401 of the CWA would constitute a divestiture or partition of the State of Wisconsin's property, sovereignty and guarantee of a republican form of government, pursuant to the Section 4 of Article IV of the Constitution.

Response: EPA's decision to approve the Tribe's TAS Application does not implicate the guarantee to the States of a republican form of government provided for in Section 4 of Article IV. Under CWA Section 518, Congress authorized EPA to grant TAS status to eligible tribes to administer certain CWA programs, including the WQS program, on reservations, pursuant to the legislative powers of Congress under the Indian Commerce Clause. U.S. Constitution, Article I, Section 8, Clause 3. EPA's decision granting the Tribe TAS status to regulate water quality on its Reservation under the CWA does not interfere with the State's property interests or sovereignty. See also the response to State Comments 1 and 4, above and Public Comment 15, below.

Public Comment 15: One commenter asserts that authorizing the Tribe to regulate water quality under Section 303 and 401 would deprive residents of Wisconsin of their rights in a representative form of government in contravention of the guarantee of a republican form of government. Additional comments expressed concern that Tribal TAS would subject them to regulation by the Tribe without the ability to participate in Tribal government.

Response: EPA's decision today relates solely to the Tribe's TAS eligibility to regulate water quality on the Reservation. The decision does not approve or disapprove the Tribe's WQS. The process for obtaining federal approval for WQS is separate from the TAS process and requires a state or tribe to provide the opportunity for public notice, comment and hearing on the proposed regulatory standards, thus allowing participation by nonmembers. See also the response to Public Comment 14, above.

Public Comment 16: One commenter asserts that there is no basis for the Tribe's Application to regulate water quality because state standards are sufficient. The comment states that Wisconsin cranberry growers are good stewards of their natural resources.

Response: As discussed above in response to State Comment 1, there are no federally-approved state WQS applicable to waters within the Reservation.

Public Comment 17: The commenter states that should the Tribe receive TAS, cranberry growers would be subject to a more stringent regulatory structure. Of particular concern is the possibility that the Tribe would treat cranberry operations as point sources.

Response: As discussed above in response to State Comment 2, approval of the Tribe's TAS Application will enable the Tribe to develop and adopt WQS consistent with the Clean Water Act subject to review and approval by EPA. Permitting under the CWA is addressed in Section 402, and the Tribe is not applying for authorization under that section. Moreover, discharges from cranberry operations are currently treated by U.S. EPA as non-point source discharges from return agricultural flows, and therefore are exempt from NPDES permitting requirements that apply to point sources.

Public Comment 18: Several commenters state that EPA should not approve the Tribe's request for TAS until the Agency receives or develops additional information on a variety of different topics, including an "economic impact statement," assessment of the Tribe's motivation in seeking the application, survey of all property owners, conducting six public hearings, and providing a guarantee that water regulations would not be more stringent than federal or state regulations.

Response: The TAS application and eligibility requirements under CWA Section 518 and EPA's regulations do not require either the Tribe or EPA to develop or take any of the information or action requested in the comment. The requirements for approval of a TAS application for the WQS program are set forth in Section 518(e) of the Clean Water Act and EPA's implementing regulations at 40 CFR 131.8.

Public Comment 19: Some commenters suggested that the Tribe and WDNR negotiate an agreement that would allow the WDNR to set WQS or otherwise develop a mechanism for resolving disputes involving private landowners.

Response: State WQS do not generally apply to waters within Indian country (see response to State Comment 1). Regarding dispute resolution, there is no requirement for the Tribe to negotiate an agreement with WDNR or with private landowners as part of the TAS process. The Clean Water Act authorizes a tribe to seek eligibility to carry out the WQS program on its own. As noted elsewhere, EPA's regulations do provide a mechanism to address disputes between states and tribes arising as a result of differing WQS adopted on common bodies of water. See 40 CFR 131.7.

Public Comment 20: Some commenters assert that TAS will prevent the State from issuing permits to dischargers upstream from the Reservation that would result in a lowering of water quality on the Reservation. This could stifle economic development. These comments state that Wisconsin waters should have some degree of uniformity and also raise questions about whether the Tribe has shown sufficient governance authority.

Response: EPA regulations require that upstream permits meet the WQS of a downstream jurisdiction at the border between the two. *Arkansas v. Oklahoma*, 503 U.S.

91 (1992). However, there is no indication that this requirement, which applies to all state and tribal jurisdictions under the CWA, would stifle economic development. See response to Public Comment 12. Regarding the comment on uniformity of regulations, please see our response to State Comment 1.

Public Comment 21: The monitoring of septic sewer ponds should be done by DNR/EPA.

Response: This comment is outside the scope of the Clean Water Act WQS program.

Public Comment 22: There are too many non-Indians living in the areas under question to allow the Indians the right to manage the resources for their exclusive benefit.

Response: CWA Section 518 authorizes EPA to approve eligible tribes to manage reservation water resources within tribal jurisdiction. See also the response to State Comment 3 and Public Comment 9, above.

Public Comment 23: Would approval of the TAS Application authorize the Tribe to have enforcement powers over non-Indians?

Response: The decision to grant the Tribe's Application for the CWA 303 and 401 programs enables the Tribe to promulgate WQS for Reservation waters. EPA will continue to implement, including enforce, the NPDES permitting program on the Reservation. Accordingly, our approval of the Tribe's TAS Application does not include enforcement authority.

Public Comment 24: The Tribe should not be allowed to take over responsibilities from the Corps of Engineers.

Response: TAS Status for CWA 303/401 will not authorize the Tribe to take over any responsibilities from the U.S. Army Corps of Engineers.

Public Comment 25: Several commenters stated that the State of Wisconsin should continue to regulate water quality in the Reservation. They expressed concerns about ensuring a uniform standard of regulation, as well as concerns about an additional layer of government.

Response: See the response to State Comment 1, above.

Public Comment 26: Some commenters expressed concern that they would not be treated fairly and the Tribe would discriminate in the enforcement of the regulations.

Response: Any WQS promulgated by the Tribe would apply uniformly within the Reservation. As mentioned in response to Public Comment 23, EPA will remain responsible for permitting and enforcement of Clean Water Act requirements within the Reservation.

Public Comment 27: The Application includes a section entitled “Actual and Threatened Impacts on the Surface Water within the Exterior Boundaries of the Lac du Flambeau Reservation from Activities of Non-member Owned Fee Land.” This shows that the Tribe intends to restrict activities such as boating and building.

Response: While EPA considers a variety of activities in assessing the impacts of non-member activities on a tribe under *Montana*, TAS authorization in today’s action is limited to Sections 303 and 401 of the Clean Water Act. See also our response to State Comment 2.

Public Comment 28: The lands in private ownership were sold by the Tribe, and the Application is an attempt by the Tribe to reacquire the property.

Response: Today’s decision by EPA granting the Tribe TAS status relates solely to regulating water resources within the Reservation.

Public Comment 29: Will approval of the Application grant to the Tribe the authority to issue permits under for activities related to waters within the Reservation?

Response: No. See the response to State Comment 2 and Public Comments 17 and 23 above.

Public Comment 30: Several commenters expressed concern about the Tribe’s capability to implement a WQS program and questioned the Tribe’s management abilities. One commenter stated that the Tribe has not met the legal standard that it be “reasonably expected to be capable” of carrying out the WQS program.

Response: EPA’s regulations specify that in determining capability, the Tribe should provide a description of its previous management experience, a list of existing public health and environmental programs managed by the tribe, a description of the existing or proposed agency of the tribe that will administer the WQS program, a description of the technical and administrative capabilities of the tribe’s staff, as well as any additional information the Agency might request. The record includes the information the Tribe submitted to fulfill these requirements, and EPA’s Decision Document provides a detailed discussion of how the Tribe has demonstrated its capability to implement the authority it is seeking for CWA sections 303 and 401.

Public Comment 31: One comment disputes the Tribe’s assertion that water is fundamental to tribal identity.

Response: The Tribe has submitted ample documentation, as described in EPA’s Decision Document, EPA’s Findings of Facts, and in the record for this action, that water resources on the Reservation are culturally important to the Tribe. It is not necessary under the CWA for EPA to consider whether water resources are “fundamental to tribal identity.”

Public Comment 32: In order to show that the effects on surface water present a “serious and substantial effect” on the health and welfare of the Tribe, the Tribe must demonstrate that the effect of the surface water on the Tribe is greater than that of any non-reservation areas.

Response: The commenter is mistaken. See the response to Public Comment 9 above.

Public Comment 33: A number of commenters stated that EPA’s press release did not provide sufficient information about a number of issues relating to the TAS Application.

Response: EPA’s press release contained pertinent information regarding the Tribe’s Application for TAS. Additionally, while not required, EPA nonetheless held a public meeting to provide additional information to interested members of the public about the Application and provided an additional chance for members of the public to ask questions and submit comments on the Application. These are not regulatory requirements, but were undertaken by EPA in order to provide as much information to the public as possible.

Public Comment 34: Several commenters expressed concerns about the impact of stringent WQS on their local sanitary district which discharges upstream from the reservation.

Response: The State of Wisconsin, as permitting authority for sources discharging outside the boundaries of federally-recognized Indian reservations, is responsible for working with permittees to ensure that discharges meet applicable, federally-approved WQS. The State will be responsible for ensuring that discharges will meet downstream standards for the Lac du Flambeau Reservation at the boundary of the Reservation, if and when they are federally approved. 40 CFR 122.4(d). As mentioned, there are currently no federally-approved water quality standards for the Lac du Flambeau Reservation.

Public Comment 35: If TAS is granted, the right to pollute might be sold to the highest bidder by the Tribal Council.

Response: Approval for TAS for Sections 303 and 401 of the CWA does not encompass selling pollution rights of any kind. As stated above, EPA’s decision today will not alter EPA’s current role as the permitting authority for sources within the Reservation. See the response to Public Comment 23, above; on the process for approval of WQS following a determination that a tribe is eligible for TAS for CWA 303/401, see response to State Comment 2 above.

Public Comment 36: At least one commenter was concerned about water bodies that are partially within the Reservation or which flow through the Reservation and asks which rules apply.

Response: See response to State Comment 1 above.

Public Comment 37: Several elected officials have written in opposition to the Tribe's Application stating one or more of the following reasons: the State of Wisconsin should regulate water quality so that regulation is uniform within the state; approval of the Application would lead to a patchwork of regulation; and the waters of the State belong to the people of the State under the public trust doctrine.

Response: See the response to State Comments 1 and 4 above, and also Public Comment 3.

Public Comment 38: Several commenters indicated that there were technical deficiencies in the studies used by the Tribe regarding impacts of cranberry operations on tribal waters. The comments state that the conclusions of the reports (in Attachment K) are not supported by the data. The comments cite concerns about mercury levels and other heavy metals being attributed to cranberry operations, lack of representative samples, no map of the study area, inadequate scale on the Y-axis in the graphs, releases of phosphorus and other nutrients, and other concerns relating to the use of the data found in Attachment K

Response: Many, if not all, of the concerns brought up by the commenters have been adequately addressed by the Tribe in supplemental information provided on their Application. In particular, the Tribe, on June 27, 2006, submitted a copy of a letter from the authors of one of the studies in question, which responds directly to several of the points made by the commenters. The letter clarifies the report's results regarding mercury levels and heavy metals and potential sources of these contaminants, the methods of data collection, and the rationale for Y-axis values. The letter also clarifies that the report only indicates changes which coincide with the growth of the cranberry industry, but that other factors are also at play and that further research is needed. Other points are addressed in other supplemental information supplied by the Tribe in their correspondence to U.S. EPA dated May 31, 2006 and April 3, 2007. The May 31, 2006 letter is from Sonosky, Chambers, Sachse, Endreson & Perry, LLP, and provides the Tribe's response to comments regarding the criticism of the water quality studies stating that the Tribe included a range of studies with its Application to demonstrate that Tribal waters are threatened by non-Indian activities under the *Montana* test. They do not purport to demonstrate that the impacts or potential impacts from the cranberry operations are the sole source of degradation of Tribal waters, but that this non-member activity is one of the sources that threaten the waters of the Reservation. The April 3, 2007, letter from Larry Wawronowicz, Deputy Administrator of Natural Resources for the Tribe also provides supplemental information to support the Tribe's Application. On pages 3-5 of this letter, the Tribe provides more information regarding the potential impacts from cranberry operations and cites several statements from the WDNR indicating actual and potential impacts caused by cranberry operations. Again, these statements highlight not only actual threats but also potential impacts to tribal waters attributed to cranberry operations on and near the Reservation. EPA believes that the supplemental information provided by the Tribe and their clarifications on the purpose of

including these studies as attachments to the Application, adequately responds to the comments made.

Public Comment 39: One of the commenters states that Attachment G, Independent Auditor's Report, illustrates that the Tribe does not have the capacity to regulate water quality adequately, and Tribal staff have stated that grants from the government will be needed to fund the lacking infrastructure.

Response: Funding is important to run any environmental program. Funding is available to states and tribes from many sources including program grants from the U.S. EPA to assist these programs in work that is consistent with federal regulations. See also the response to Public Comment 30.

Public Comment 40: The existence of extensive shoreland zoning under Wisconsin Administrative Code ch. NR 155 and the shoreland zoning ordinance of Vilas, Oneida and Iron Counties need to be reflected in the EPA's Findings.

Response: The Proposed Findings of Fact did have several references to the Vilas County Shoreland Ordinance. Nevertheless, reference to these additional zoning ordinances has been added to the final version of the Findings of Fact within Section C.1.

Public Comment 41: The data submitted to support allegations concerning water quality and lake habitat is associated with an array of post-settlement changes, not merely the subjects of shoreline development or boating activities addressed in the Proposed Findings of Fact, and this should be reflected in the EPA's Findings.

Response: Reference to this point was added to the final version of the Findings of Fact within Section C.1.F. From the introduction of the report by Dr. Marjorie G. Winkler, *The Paleoecology and pH History of Ike Walton Lake in Comparison with the Recent History of Zee Lake*, Final Report to the Lac Du [sic] Flambeau Water Resources Program Contract #1243 (1996), the following was added to the Findings: "The changes and impacts noted in this report were caused by various anthropogenic factors including occupation by hunter-gatherer peoples, the French traders, and commercial logging and other permanent European settlements."

Public Comment 42: The substantial data from the Lac du Flambeau Reservation area demonstrating that water quality parameters have been virtually constant over the past 15 years, despite continued cranberry operations in the area, needs to be addressed in the EPA's Findings of Fact.

Response: The EPA's Findings of Fact were not revised in response to this comment. The Findings of Fact focuses on data that have shown impacts or the potential to cause impacts. While data that show no impact in certain situations or locations is valuable, it does not influence the use of information that is referenced within the EPA's Findings.

Public Comment 43: The data demonstrating that aquatic habitat and wildlife values are well documented in cranberry operations needs to be noted within the EPA's Findings. (Commenter referred to and provided a report entitled: Wildlife Diversity and Habitat Associated with Commercial Cranberry Production in Wisconsin, by Eric Edward Jorgensen, May 1992.)

Response: The EPA's Findings of Fact were not revised in response to this comment. The EPA's Findings of Fact provide examples of actual and potential impacts to aquatic habitat and wildlife values due to cranberry operations on and near the Lac du Flambeau Reservation. The report provided by the commenter does provide additional documentation relating to impacts to the areas around cranberry operations caused by the operations. The report notes: "There were many factors that may have contributed to the disturbance measured in the sedge meadows. Desiccation due to increased exposure to wind and sand caused the area near the cranberry beds to be drier. Sand eroded and was blown by the wind into the wetland, changing its physical and chemical properties. Herbicides are incorporated in drainage-water, chronically exposing the matrix to low concentrations of these compounds (p. 45)." The report also notes: "Disturbance affected much more wetland than that which was directly converted to cranberry beds (p. 46)." Additionally, the report highlights impacts to the avian community, "Swamp sparrows, a prevalent wetland species, and the abundant song sparrow were negatively impacted by the presence of the cranberry bed matrix (p. 87)." Finally, the report notes: "There was a measurable degree of disturbance in the area near cranberry beds. Disturbance was observable and measurable in the avian community, the amphibian community, the invertebrate community, and the vegetation (p. 158)." While these observations are of interest, since actual and potential impacts were already noted in the EPA's Findings, these additional points need not be added.

Public Comment 44: The source of mercury in reservation waters primarily comes from atmospheric deposition. Most of this deposition is from large sources from urban areas not only outside the reservation, but often outside the state. This needs to be noted in the EPA's Findings.

Response: Language was added to the two sections regarding mercury from logging operation (B.4 and C.4.B) to reflect that the primary source of mercury is from atmospheric deposition.